(1)

91-793

IN THE SUPREME COURT OF THE UNITED STATES

No: _____

OCTOBER TERM, 1991

THE PEOPLE OF THE STATE OF MICHIGAN,

PETITIONER

vs.

MARVIS HARRIS

RESPONDENT

NATURE OF ACTION:

PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS
OF THE STATE OF MICHIGAN

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

SHOULD THIS GRANT CERTIORARI TO REVIEW THE VALIDITY UNDER THE FOURTH AMENDMENT OF "BUY AND BUSTS;" THAT IS, PROMPT RE-ENTRIES INTO DWELLINGS AFTER AN UNDERCOVER PURCHASE OF NARCOTICS IN THE DWELLING, ACHIEVED IN ORDER TO RECOVER EVIDENCE (MARKED FUNDS) AND TO ARREST?

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NOW COME the People of the State of Michigan, by John D. O'Hair, Prosecuting Attorney for the County of Wayne, Timothy A. Baughman, Chief of Research, Training and Appeals, and Janice M. Joyce Bartee, Assistant Prosecuting Attorney, and pray that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of Michigan entered in the above-entitled cause on July 17, 1991, leave to appeal denied by the Michigan Supreme Court on October 22, 1991.

OPINIONS BELOW

The order of the Michigan Court of Appeals is unreported and is appended as Appendix A. The Order of the Michigan Supreme Court is unreported at this time and is appended as Appendix B.

STATEMENT OF JURISDICTION

The judgment of the Michigan Court of Appeals was entered on July 17, 1991. The order of the Michigan Supreme Court was entered on October 22, 1991. The jurisdiction of this Court is invoked under 28 USC (1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides: "The right of the People to be secure in their

persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> ...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The appellate litigation in this matter began by an appeal by the People from the suppression of evidence in a drug prosecution by the Trial Court (with the consequence of dismissal of the case). The evidence taken at the suppression hearing is as follows.

Officer Moore testified that he had 12 years in the department, four years in narcotics. He made an undercover buy at the apartment from the defendant with $20 of secret service funds, and had made hundreds of buys in the past (R, 18). The operation was a "buy-bust" (an undercover officer goes into a drug house to buy drugs, makes the purchase, leaves, and then the police promptly raid the house). After Officer Moore made the buy he left and informed the crew chief, there was a

briefing, and within 15 minutes they attempted to gain entry. He also saw the defendant throw envelopes out the window (R, 19). Entry to the apartment was attempted within 15 seconds after the throw out the window was made. The throw occurred as the officers were forcing the outer (common) door (R 21-22). Defendant was to be arrested, according to the plan.

Ronald Davis testified that he was assigned to Narcotics for 5 years, the police department for 13. On December 17, 1988 at 2:30 in the afternoon he went to 1441 Lakewood, apt. 101 for a "buy-bust" operation. Davis received a communication to go to the apartment to recover the secret service funds, and was assigned outside security. He observed defendant stick her head out the first floor window, and for her safety and theirs was ordered to return inside. While the team was at the common door to the building, and the

apartment door, the Defendant again appeared and threw numerous packs of white coin envelopes out the window right in front of the officer, who identified her (R, 9-10).

Given the nature of the operation and the need to secure the secret service funds swiftly the officers had no warrant. The common door was forced, after the police presence was announced. Davis was less than a mile away when the undercover officer made the buy (R, 12-13). Less than 5 minutes elapsed before the crew arrived after the buy (R, 13). The purpose of the officers' entry was to retrieve the marked funds. (R, 15-16).

Officer William Stevenson testified that he was the crew chief. After the buy, there was a quick briefing on how to conduct the raid (R, 24). The officers

acted swiftly because they feared losing the secret service funds if went to get a search warrant.

The Trial Court held that the abandonment was result of "blatantly improper and arguably dangerous police conduct" and that no exigent circumstances existed to excuse a warrant; thus the case was dismissed (R, 29).

The Michigan Court of Appeals agreed, finding a lack of exigent circumstances, and the Michigan Supreme Court declined review. The State seeks certiorari.

Reasons for Granting the Writ

The State submits that the warrantless re-entry into Respondent's home was justified to prevent the destruction/ removal of evidence (secret service funds) which could readily be removed and/or destroyed. Further, it was made after the defendant's privacy interest had already been given up through consent to the undercover officer to enter and purchase drugs, the officer then having the authority to arrest immediately while in the premises, a felony having been committed in his presence, though this was not done (that hardly being the prudent and safe thing to do by the lone undercover officer).

One ground for warrantless entries is exigent circumstance ground due to the

threat of the destruction of evidence. Cupp v Murphy, 412 US 291, 93 S Ct 2000, 36 L Ed 2d 90 (1973); United States v Rivera, 825 F 2d 152 (1987). The holding of the Michigan Court of Appeals that the Fourth Amendment precluded the prompt re-entry here is contrary to authority from federal circuits, upholding these prompt re-entries after undercover purchases of narcotics. One such case is United States v Cattouse, 846 F 2d 144 (CA 2, 1988), cert den 109 S Ct 316 (1988).

In Cattouse five agents went to a suspected drug house to make an undercover buy. To avoid possible lookouts, agents moved frequently and stayed some distance away. A buy with $3000 in marked buy money was made. The informant making the buy reported that three other people were in the apartment or hallway area with Cattouse. The agents decided to make an arrest in order to retrieve the secret

service funds. Thus, approximately 50 minutes after the buy a forcible entry was made when the door was opened in response to the informant's knock, and the marked buy money was seized. The defendant also made admissions.

The Cattouse Court noted that "distributing narcotics in unquestionably a most serious offense...and, as this court has often observed, narcotics dealers are frequently armed." The court also agreed with the district court finding that there was a substantial risk that Cattouse or another person would be able to leave the building undetected and remove the marked buy money (this, like the instant case, was an apartment building). Cattouse's principal argument was that the exigency was foreseeable and created by the agents, and that a telephonic warrant could have been obtained. The court disagreed.

Furthermore, in United States v Zabare, 871 F 2d 282 (CA 2, 1989) the Court noted that in Cattouse "we declined to accept the argument that circumstances are not exigent if the method of investigation gives rise to the exigency." See also supporting Petitioner's position United States v Alfonso, 759 F 2d 728 (CA 9, 1985); United States v Miles, 889 F 2d 383 (CA 2, 1989); United States v MacDonald, 916 F 2d 766 (CA 2, 1990 (en banc decision); Johnson v State, 662 P 2d 981 (Alaska App, 1983); People v Chianakas, 448 N E 2d 620 (Ill App, 1983); State v Narcisse, 368 SE 2d 654 (NC App, 1988).

In conclusion, the State submits that the decision of the Michigan Court of Appeals is contrary to that of federal circuits and other states. Certiorari should be granted on this important constitutional question.

Conclusion

WHEREFORE, the People request that plenary review be granted.

Respectfully submitted,

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TIMOTHY A. BAUGHMAN
Chief of Research,
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JANICE M. JOYCE BARTEE
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Dated: November 4, 1991
JMJB/jh

APPENDICES

APPENDIX A

COURT OF APPEALS OPINION

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

July 17, 1991

No: 120188

MARVIS HARRIS,

Defendant-Appellee.

Before: Gillis, P.J., and Sawyer and Reilly, JJ.

PER CURIAM.

The People appeal from an order of the circuit court suppressing evidence and dismissing a charge of deliver of less than fifty grams of cocaine. MCL 333.7401 (2)(a)(iv); MSA 14.15(7401)(2)(a)(iv). We affirm.

An undercover police officer went to defendant's apartment where her purchased four rocks of cocaine from defendant for

$20. The officer then left and met with other officers for a pre-raid briefing. Approximately fifteen minutes later, several Detroit police officers raided defendant's apartment. They did not have a search warrant. In addition to the arrest of defendant, the officers' search apparently also yielded controlled substances and a recovery of secret service funds used by the undercover officer to purchase the cocaine.

On appeal, the prosecutor argues that the trial court erred in suppressing the evidence seized during the raid. Specifically, the prosecutor argues that the search without a warrant of defendant's premises was lawful as it came under the so-called exigent circumstances exception to the warrant requirement. We disagree.

This case is controlled by the Supreme Court's recent decision in People v Blasius, 435 Mich 573; 459 NW2d 906 (1990). In Blasius, the Court upheld a search where

the officers entered the premises without a warrant and secured the premises until such time as a search warrant was obtained some hours later. In doing so, the Court concluded that the officers' conduct was lawful under the exigent circumstances exception to the warrant requirement. However, they did discuss the limited nature of the applicability of this exception. Specifically, the Court noted that, to justify entry of a premises under the exigent circumstances exception, the police must show, first, that probable cause exists that the premises contains contraband or evidence of a crime and, second, the existence of an actual emergency, articulating specific and objective facts which reveal a necessity for immediate action. Blasius, supra at 593-595.

In the case at bar, the prosecutor cites as the exigent circumstance the

possibility of the loss of the secret service funds in defendant's possession with which the undercover officer had purchases the cocaine. The Court in Blasius, supra at 594, discussed the facts needed to justify a search without a warrant under the exigent circumstances exception on the basis of the fear of the removal or destruction of evidence:

> In the context of a removal or destruction of evidence case, the most objective and compelling justification would be an actual observation of removal or destruction of evidence or such an attempt. Absent such compelling facts, the police must present facts indicating more than a mere possibility that there is a risk of the immediate destruction or removal of evidence. It seems self-evident that "warrantless searches of a home should not [be conducted by the police or validated by the courts] every time evidence is merely 'threatened with destruction' [because police] may rationally perceive possibilities of destruction whenever they thin evidence [of contraband] is on the premises." To validate searches of a residence on the basis of hypothetical possibilities of destruction or removal would essentially nullify Fourth

> Amendment protections. However, in those cases where the police can show an objectively reasonable basis to believe the risk of destruction or removal of evidence is imminent -- that immediate action is necessary before they can obtain a warrant -- they may enter a residence for the limited purpose of securing the premises pending issuance of a search warrant. [Emphasis added.]

In the case at bar, the police had no more than the hypothetical possibility of the removal of the sought-for evidence, the secret service funds, to justify their taking immediate action without a warrant. At the suppressio hearing, the officers offered no objective or articulable facts in support of their fear of the loss vague, unspecific fear that the evidence may have been removed had immediate action to been taken. Furthermore, we note that under Blasius, even if the exigent circumstances existed to warrant entry onto the premises due to the fear of the loss or destruction of evidence, all that is justified is the

officers' entering and securing the premises to prevent the loss or destruction of evidence and await a search warrant before conducting any further search. In the case at bar, the officers did not merely secure the premises and await the arrival of a warrant. A warrant was never sought.

Additionally, we not that the Court in Blasius specifically addressed the issue of the fear of loss of marked police money, concluding that, while it does support a finding of exigent circumstances, it is insufficient by itself to justify an entry without a warrant. Blasius, supra at 596.

Furthermore, there is a significant differentiating fact between this case and Blasius. In Blasius, the Court's conclusion that exigent circumstances existed was based at least in part of the fact that the police did not know that they were going to end up a defendant's

residence when the operation began. Id. at 596. The Court noted, however, that where the police can anticipate in advance the likelihood of searching a particular residence, their failure to obtain a warrant in advance contributes to the exigency and should not be validated. Id. at 597-598.

In the case at bar, the officers presumably could not have obtained a warrant in advance as probable cause did not arise until after the undercover officer made the buy. However, it appears from the undercover officer's testimony that he knew at least some point in advance that he would be going to defendant's residence. Accordingly, it would have been possible for a search-warrant request to have been prepared in advance and an officer ready at the district court to fill in the missing information (the fact that a buy was made) and promptly obtain the

warrant and deliver it to the scene. During such time, plain-clothes officers could have kept the premises under the surveillance to ensure that defendant did not leave with the evidence prior to the arrival of the search warrant.[1] However, it is clear that the officers in the case at bar never intended to seek a search warrant and had at all time planned on raiding the premises following the buy by the undercover officer without going to the trouble of obtaining a warrant. The exigent circumstances exception to the warrant requirement does not exist merely to save the officers from the bother of obtaining a warrant. Rather, it exists to apply to those circumstances where it is not reasonably possible to obtain a warrant. This is not such a case.

The prosecutor also puts some stock in the fact that defendant was observed throwing envelopes of drugs out her

apartment window immediately before the officers entered the premises. This, however, does nothing to establish exigent circumstances inasmuch as defendant's actions were obviously in response to the presence of the officers outside the apartment building and their attempts to force open the common door to the apartment building. Inasmuch as the officers were unlawfully engaged in a search warrant without a warrant in attempting to enter the building, defendant's response to that unlawful activity cannot establish exigent circumstances.

For the above reasons, we conclude that the trial court did not err in ordering the evidence suppressed.[2]

Affirmed.

/s/ John H. Gillis

/s/ David H. Sawyer

/s/ Maureen Pulte Reilly

[1] Obviously, if defendant were seen leaving the premises the analysis of the existence of exigent circumstances would be materially altered and that fact would provide an objective and articulable reason to fear the loss of evidence.

[2] We need not determine whether defendant could nevertheless have been tried on the charge despite the trial court's suppression of evidence inasmuch as the prosecutor does not argue that the trial court erred in dismissing the charges in addition to suppressing the evidence. Cf. People v Tejeda (On Rehearing), 188 Mich App 292; --- NW2d --- (1991).

APPENDIX B

MICHIGAN SUPREME COURT ORDER

Entered: October 22, 1991

92112

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

MARVIS HARRIS,

Defendant-Appellee.

SC: 92112
COA: 120188
LC: 89-000479

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the question presented should be reviewed by this Court.

81017

Seal

October 22, 1991 /s/ Corbin R. Davis
Clerk